Sygma Network Corp., a wholly-owned subsidiary of Sysco Corporation *and* Michael La Rue Kontur *and* Local No. 299, International Brotherhood of Teamsters, AFL–CIO. Cases 7–CA–33220(1) and 7–CA–33220(2)

May 12, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, BROWNING, AND TRUESDALE

On May 27, 1993, Administrative Law Judge Marvin Roth issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief to the Respondent's exceptions and also filed cross-exceptions with a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified, and to adopt the recommended Order as modified.[1]

The judge found, inter alia, that the Respondent had violated Section 8(a)(1) of the Act by certain language in a letter that it had sent the employees concerning the prospect of a strike. The judge found unlawful the comment in the Respondent's letter that ''WE HAVE THE LEGAL RIGHT TO HIRE PERMANENT REPLACEMENTS FOR EMPLOYEES WHO STRIKE OVER CONTRACT DEMANDS.'' In doing so, the judge noted that he had already found that the Respondent's general manager, Johnson, had unlawfully threatened that the Union would not get the employees anything more than what they already had. In that context, the judge found that ''the letter was tantamount to a threat that the Company would permanently replace employees who struck over contract demands, even if the failure to obtain a satisfactory contract was caused by Company failure or refusal to bargain in good faith.''

We agree with the judge that the language in the Respondent's letter violated the Act but, in so finding, we note additionally that in the sentence immediately preceding the one set out by the judge, the Respondent indicated that ''[i]f you go on strike in support of this union's contract demands, YOU COULD LOSE YOUR JOB.'' And, in that context, we note the judge's further findings that the Respondent had violated Section 8(a)(1) when its supervisor, Blanchard, ''threatened the employees with plant closure if they selected the Union as their bargaining representative, and further threatened the employees with unspecified reprisals by suggesting that they would hang their own necks if they selected the Union.'' In the total context then, it is clear that the language in the Respondent's letter violated the Act, and we so find.[2]

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for paragraph 6 of the judge's conclusions of law.

''6. By discriminatorily invoking its dress code against Michael Kontur, thereby discouraging membership in the Union, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) of the Act.''

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Sygma Network Corp., a wholly-owned subsidiary of Sysco Corporation, Columbus, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

''(a) Discouraging membership in Local No. 299, International Brotherhood of Teamsters, AFL–CIO, or any other labor organization, by discriminatorily invoking its employee dress code, or in any other manner discriminating against employees with regard to their tenure of employment or any term or condition of employment.''

2. Substitute the attached notice for that of the administrative law judge.

[1] In agreeing with the judge that the Respondent violated Sec. 8(a)(5) and (1) of the Act in its discharge of Michael Kontur, we find the judge's reasoning comported with the analysis set out in *Great Western Produce*, 299 NLRB 1004, 1005 (1990). We also find that the question of Kontur's entitlement to reinstatement and backpay has already been litigated in this case and that he is entitled to both as he was discharged pursuant to a policy that the Respondent unilaterally instituted in violation of Sec. 8(a)(5) and (1). *Great Western Produce*, supra at 1005–1007 and fn. 10 (employees Steeves, Trujillo, Willis, and Yant).

Because we agree with the judge that Kontur's discharge violated Sec. 8(a)(5), we find it unnecessary to pass on the judge's additional finding that Kontur's discharge also violated Sec. 8(a)(3) of the Act because the reinstatement and make-whole remedy for Kontur are not thereby affected.

The judge also found that the Respondent violated Sec. 8(a)(3) of the Act by discriminatorily applying its dress code, but he omitted that finding from his conclusions of law and Order. We shall modify the judge's conclusions of law and Order accordingly.

[2] In finding the violation, Member Stephens relies on the reasoning he set out in *Casa Duramax, Inc*., 307 NLRB 213 fn. 1 (1992).

Member Truesdale finds it unnecessary to decide whether the Respondent's comments would have been lawful even in the absence of the additional language in the letter and the additional 8(a)(1) violations noted above.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage membership in Local No. 299, International Brotherhood of Teamsters AFL–CIO, or any other labor organization, by discriminatorily invoking our employee dress code, or in any other manner discriminating against employees with regard to their tenure of employment or any term or condition of employment.

WE WILL NOT fail or refuse to bargain collectively in good faith with Local No. 299 as the exclusive representative of all our employees in the appropriate unit, by unilaterally changing the terms and conditions of employment of unit employees without affording Local No. 299 prior notice and an opportunity to negotiate and bargain concerning such changes as the representative. The appropriate unit is:

> All full-time and regular part-time drivers, drivers' helpers, warehouse employees employed by us at our facility located at 660 Detroit Street, Monroe, Michigan; but excluding office clerical employees, guards, and supervisors as defined by the Act.

WE WILL NOT terminate employees pursuant to such unilateral changes.

WE WILL NOT threaten you with plant closure, discharge, loss of jobs, refusal to bargain, or other reprisal if or because you engage in union or protected activities, select Local No. 299 as your bargaining representative, or engage in a lawful strike.

WE WILL NOT promise you benefits in order to discourage support for Local No. 299 or any other labor organization.

WE WILL NOT interrogate you concerning your own or other employees' membership in, activities on behalf of, or attitude toward Local No. 299 or any other labor organization.

WE WILL NOT create the impression that union meetings or other union activities are under surveillance by indicating to you that we know of such activities.

WE WILL NOT promulgate or maintain rules which prohibit employees from distributing union literature during nonworktime in nonwork areas of our premises, or which prohibit employees from wearing union insignia.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your right to engage in union or concerted activities, or to refrain therefrom.

WE WILL offer Michael Kontur immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or to any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.

WE WILL expunge from our files any reference to the termination of Michael Kontur, and notify him in writing that this has been done and that the evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

WE WILL rescind our rules prohibiting distribution of printed material on company premises and prohibiting employees from wearing hats, clothing, or accessories displaying printing, advertisements, slogans, or logos other than the company logo.

WE WILL if requested by Local No. 299 rescind our policies and practices promulgated or instituted since December 20, 1991, concerning alcohol and drug usage, sexual harassment, penalty for driving over 65 m.p.h., mandatory wearing of weigh belts, and payment for lost and damaged uniforms and reimburse our employees for their losses, if any, caused by such policies and practices, with interest.

> SYGMA NETWORK CORP., A WHOLLY-OWNED SUBSIDIARY OF SYSCO CORPORATION

Amy Bachelder, Esq., for the General Counsel.
David P. Wood, Esq., of Detroit, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. These consolidated cases were heard at Detroit, Michigan, on March 22 and 23, 1993. The charge in Case 7–CA–33220(1) was filed on April 30, 1992, by Michael La Rue Kontur, an individual. The charge and amended charge in Case 7–CA–33220(2) were filed respectively on May 29 and June 3, 1992, by Local No. 299, International Brotherhood of Teamsters, AFL–CIO (the Union). The consolidated complaint, which issued on June 26, 1992, and was amended at the hearing, alleges that Sygma Network Corp., a wholly-owned subsidiary of Sysco Corporation (the Respondent or the Company), violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. The gravamen of the complaint falls within three general categories. First, the complaint alleges in sum that during the course of a representation election campaign, the Company engaged in unlawful threats of reprisal, promises of benefit, coercive interrogation, creating the impression of surveillance of employee union activity, and maintaining overly broad rules restricting distribution of literature and wearing of union insignia. The second category alleges in

sum that following the election on December 19 and 20, 1991, which the Union won, the Company unilaterally changed certain conditions of employment, both for discriminatory reasons and in violation of the Company's bargaining obligations to the Union. The third category concerns the discharge of Kontur, allegedly for discriminatory reasons and as a consequence of one of the unilateral changes. The Company's answer denies the commission of the alleged unfair labor practices. All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. The General Counsel and the Company each filed a brief.

On the entire record in this case[1] and from my observation of the demeanor of the witnesses, and having considered the briefs and arguments of the parties, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

The Company, a Delaware corporation with its principal office in Columbus, Ohio, maintains a number of facilities throughout the United States, including a place of business in Monroe, Michigan. The Company is engaged in the warehousing and wholesale distribution of food and related supplies, specializing in distribution to fast-food restaurants. In the operation of its business the Company annually purchases and receives at its Monroe place of business goods and materials valued in excess of $50,000 directly from points outside of Michigan. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION AND BARGAINING UNIT INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act. In October 1991 the Union commenced an organizational campaign among the employees at the Monroe facility.[2] On November 5, the Union petitioned for a Board-conducted election (Case 7–RC–19718). The Company received the petition on November 7. Pursuant to a Stipulated Election Agreement, the Board conducted an election on December 19 and 20 among the employees in the following appropriate unit:

> All full-time and regular part-time drivers, drivers' helpers, and warehouse employees employed by the Company at its facility located at 660 Detroit Street, Monroe, Michigan; but excluding office clerical employees, guards and supervisors as defined in the Act.

The Union won the election by a vote of 18 to 15, with no challenged ballots. The Company filed timely objections to the election. On February 28, 1992, the hearing officer issued his report and recommendation that the objections be overruled. On September 1, 1992, the Board adopted the hearing officer's findings and recommendations, and certified the Union as bargaining representative of the unit employees. As of the time of the present hearing the Company and the Union were engaged in contract negotiations.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Alleged Unlawful Conduct During the Election Campaign*

Robert Johnson is general manager and in charge of the Monroe facility. Warehouse Manager Scott Larkins, Transportation Manager Eric Redmond, who supervises the drivers and drivers' helpers, and Office Manager Kelly Lazette, report to Johnson. Gerard Blanchard is a warehouse supervisor and reports to Larkins.

Michael Kontur began working for the Company in March 1988. During the period in question Kontur worked as a warehouseman and driver's helper. Blanchard was his immediate supervisor. Warehouse Manager Larkins, who terminated Kontur on April 10, testified that he was a good employee. Kontur testified in sum as follows: He attended a union meeting on October 31, where he signed a union authorization card. Thereafter he attended other union meetings during the election campaign, and spoke in favor of the Union to the other employees. Employees referred to meetings held at a private home as ''card parties.'' In November Supervisor Blanchard approached Kontur at work. He asked Kontur why the employees wanted a union, what was the problem and ''could it be resolved without it.'' Kontur answered that it was too late for that. On another occasion, the morning after the second meeting at an employee's home, Blanchard asked Kontur how the card party went. Kontur answered that it went fine. Greg LaDuke, Randy Sandifer, and Thomas Haman also worked in the warehouse, and were still employed by the Company at the time of the present hearing. LaDuke testified that about December 1, Blanchard approached him at work and asked why they wanted a union, and what was the problem. LaDuke answered that he didn't know. Sandifer testified in sum as follows: During the organizational campaign, Blanchard summoned Sandifer to discuss his productivity. Instead he asked Sandifer what were the problems, asserting that ''we know what's going on.'' Alluding to a prior organizational campaign, Blanchard said: ''I'm staying out of it this time. If you guys want to hang your own necks, that's entirely up to you.'' Haman testified that in December, prior to the election, Blanchard told him that ''if the Union got in, they would close the doors.'' Haman answered that they probably wouldn't.

Supervisor Blanchard, as a witness, did not deny the employees' testimony. Blanchard testified that he was instructed to give only his own opinion, and that he give his opinions to LaDuke and Kontur. He did not testify, however, that he told employees he was giving only his personal opinion. Blanchard admitted that he asked LaDuke why he felt they needed a union. Blanchard testified that he did not recall conversations with Haman, but did not deny that such conversations took place. I credit the employees' testimony. Blanchard was and is, a supervisor and agent of the Company within the meaning of Section 2(11) and (13) of the Act. It is evident that when he asked Kontur whether the problem could be resolved without a union, he was speaking on behalf of higher management and so indicated to Kontur. I find that the Company, by Blanchard, threatened the employees with plant closure if they selected the Union as their

[1] Certain errors in the transcript have been noted and corrected.

[2] All dates are for the period from September 1, 1991, through August 31, 1992, unless otherwise indicated.

bargaining representative, and further threatened the employees with unspecified reprisals by suggesting they would hang their own necks if they selected the Union. I further find that the Company, by Blanchard, created the impression of surveillance of employee union activity by asking Kontur how the card party went, and telling Sandifer ''we know what's going on.'' I further find that the Company, by Blanchard, coercively interrogated employees concerning their union attitudes and activities. Blanchard had no legitimate reason for questioning the employees, and he gave them no assurance against reprisal. Rather, his questioning was accompanied by threats and other unlawful statements. As has been and will be discussed, his questioning took place in the context of other unfair labor practices. I find that by the foregoing conduct, the Company by Blanchard violated Section 8(a)(1) of the Act. I further find, in light of Kontur's responses, that the Company knew early on that Kontur was a strong union adherent.

Kontur, LaDuke, and Sandifer testified concerning a Company-conducted meeting in the breakroom for warehouse employees in early December. Johnson, Larkins, Blanchard, and 6 to 10 warehouse employees were present. Attendance was mandatory. LaDuke and Sandifer testified in sum that Johnson began the meeting by repeatedly, and with reference to specific concerns, asking the employees why they wanted a union. In Sandifer's words, Johnson ''just wanted an answer.'' Johnson then spoke against the Union. Kontur testified in sum as follows: He spoke up, first disagreeing with Johnson, and then telling Johnson that he didn't have to listen to this antiunion talk. Johnson, visibly angered, replied that this was a mandatory meeting. Johnson declared that the Union would not get the employees anything more than what they already had, they could even lose benefits, and even if they kept the same benefits, they would lose by paying union dues of $30 per month. Kontur commented that $30 a month was a cheap lawyer. LaDuke and Sandifer inferentially corroborated Kontur's testimony. LaDuke testified there was ''a heated discussion of sorts'' between Johnson and Kontur, and both were shouting. Sandifer testified they had a heated discussion, although he did not recall what was said. LaDuke and Sandifer further testified in sum that employee Larry Clawson interrupted, asking whether, if the Union did not get in, they could have ''problem-solving meetings,'' with representative employees meeting with management. Johnson said this was possible and ''a good idea.''

I credit the employees' uncontroverted testimony concerning the meeting. I find that the Company by Johnson violated Section 8(a)(1) by interrogating the employees concerning their attitude toward unionization. It is evident from the testimony of LaDuke and Sandifer that Johnson was not simply posing ''a rhetorical question'' (Company's Br., p. 17), but was pressing the employees for answers, and in the process, soliciting employee grievances. Johnson had no legitimate reason to question the employees, he gave them no assurance against reprisal, and his questioning occurred in the context of threats and other unlawful statements. I further find that Johnson indicated that the Company would not bargain in good faith with the Union, by telling them categorically that the Union would not get them anything more than what they already had. Johnson did not qualify his suggestion by describing the bargaining process, or pleading financial inability. Rather he simply stated in essence, a predetermined company position not to give more.[3] I also find that Johnson violated Section 8(a)(1) by impliedly promising to recognize and deal with an employee grievance committee if the employees rejected union representation. As found, Johnson used the meeting as a means of soliciting employee grievances. It is settled law that ''the solicitation of grievances at preelection meetings carries with it [a rebuttable] inference that an employer is implicitly promising to correct those inequities it discovers as a result of its inquiries.'' Here, Johnson did not rebut such inference. Rather, in response to employee Clawson's suggestion, Johnson indicated that an employee grievance committee was a good idea. Johnson thereby unlawfully promised benefits contingent upon union defeat in the election. See *Radio Broadcasting Co.*, 277 NLRB 1112, 1123 (1985). The meeting also constitutes further evidence of company knowledge of and hostility toward Kontur by reason of his outspoken support for the Union.

During the election campaign, the Company sent mailings to its employees, including a two-page letter, signed by Johnson, concerning the prospect of a strike. The letter, as General Counsel put it (Br. 4) ''spelled out in detail the horrors that would befell an employee in the event of a strike.'' The letter stated among other things, in bold type: ''WE HAVE THE LEGAL RIGHT TO HIRE PERMANENT REPLACEMENTS FOR EMPLOYEES WHO STRIKE OVER CONTRACT DEMANDS.'' The complaint alleges that through its letter, the Company unlawfully ''threatened employees with loss of jobs in the event that they engaged in an economic strike in support of the Charging Union's contract demands.'' The letter did not say in so many words that a strike was inevitable in the event of unionization. The letter, however, asserted that ''a strike is always a risk with a union,'' indicating that a strike was a virtual certainty if the Company did not agree to the Union's contract demands. I find in the context of Johnson's statements to the warehouse employees, that by his letter the Company unlawfully threatened its employees with permanent loss of their jobs if they engaged in a lawful strike. As found, Johnson unlawfully threatened the employees that the Union would not get the employees anything more than what they already had. In that context, the letter was tantamount to a threat that the Company would permanently replace employees who struck over contract demands, even if the failure to obtain a satisfactory contract was caused by company failure or refusal to bargain in good faith. Therefore the letter was unlawful. See *American Medical Insurance Co.*, 224 NLRB 1321 fn. 2, 1329 (1976).

The Company, formerly known as Sugar Food Corporation, issues a handbook to its employees, containing company policies and rules. A handbook dated December 1, 1990, and reissued in July 1991 (G.C. Exhs. 8, 12), was in effect from December 1, 1990, until after the election, in or about April 1992, when the Company issued a new handbook to its employees (G.C. Exh. 12). Both the old and new handbooks provided, under the heading of ''Non-solicitation Policy'': ''Employees are not allowed to distribute any print-

[3] The complaint does not allege that at this meeting, Johnson unlawfully threatened the employees. The meeting, however, which is the subject of other allegations involving Johnson's statements, was fully and fairly litigated. The complaint alleges that in December Warehouse Manager Larkins made unlawful threats and engaged in coercive interrogation. No evidence, however, was adduced in support of these allegations.

ed material on company premises.'' An employer rule that prohibits employees from engaging in distribution of union literature during nonworktime and in nonwork areas, is presumptively unlawful in the absence of evidence that special circumstances make the rule necessary in order to maintain production or distribution. *NLRB v. Magnovox Co. of Tennessee*, 415 U.S. 322 (1974). No such special circumstances were shown in the present case. Therefore the Company has violated and is violating Section 8(a)(1) by maintaining an overly broad rule prohibiting distribution of union literature. The old and new handbooks also prohibited employees from wearing ''hats, clothing or accessories displaying printing, advertisements, slogans or logos other than [company] logo.'' The complaint alleges that the rule unlawfully prohibits an employee from wearing union buttons, patches, or insignia. As this allegation is closely related to events occurring after the election, I shall discuss the allegation in the next section of this decision.

B. *Alleged Unilateral Changes After the Election*

Both the old and new handbooks purported to impose a mandatory dress code, including a Company-provided two-toned blue standard industrial uniform. The parties stipulated that since January 1, 1990, there has been no discipline for violations of the uniform policy at the Monroe facility. Employees Kontur and LaDuke testified in sum without contradiction, that until after the election no dress code was enforced. Customers rarely came to the warehouse. Most but not all warehouse employees wore the standard uniform. Employees including Kontur and LaDuke variously wore personal baseball caps or hats instead of the company cap with logo, personal T-shirts or tank tops instead of the uniform shirt, blue jeans instead of uniform pants, or tennis shoes instead of regulation leather shoes. Kontur further testified in sum without contradiction, as follows: On the day after the election, at work, he wore a baseball cap with a union logo. The following day he took off his outer (uniform) shirt because he was hot. Supervisor Blanchard told him to put it back on. Kontur went on working, and then complained to general manager Johnson. Johnson responded that Kontur brought the whole thing on himself by wearing his hat the previous day. Kontur argued that another (antiunion) employee was not wearing a company uniform. Johnson insisted that Kontur targeted himself by wearing the hat, and suggested Kontur could wear a company hat. Kontur said he didn't wear hats, explaining that he wore the hat the previous day as a ''a fashion statement.'' One driver, but no other warehouse employees, wore a cap with a union logo. To Kontur's knowledge, no other employee was asked to remove a personal hat.

''The right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity. . . . A rule which curtails that employee right is presumptively invalid unless special circumstances exist which make the rule necessary to maintain production or discipline, or to ensure safety.'' *Windemuller Electric*, 306 NLRB 669, 670 (1992). In the present case, the company rule on its face purports to ban wearing of union insignia. No circumstances have been shown that would warrant such a rule. By maintaining the rule, the Company violated Section 8(a)(1). I further find that the Company violated Section 8(a)(1) and (3) by discriminatorily invoking its dress code, requiring Kontur to wear a uniform dress shirt in reprisal for his wearing a cap with union logo.

In late March 1992, the Company distributed to its employees certain handbook revisions, which it subsequently incorporated into the new handbook. The revisions pertained to three areas: harassment, alcohol and drug usage, and uniform and personal appearance guidelines. Kontur received his copy of the revisions on March 26. The revisions included major substantive changes in company policy, particularly with respect to sexual harassment and alcohol and drug use. The old handbook simply referred to sexual harassment, together with racial and religious harassment, as objectionable conduct subject to disciplinary action. The revisions, however, provided a detailed definition of sexual harassment, together with specific examples of conduct regarded by the Company as such harassment. With regard to drug usage, both the old handbook and the revisions in sum prohibited employees from reporting to work or remaining on duty while under the influence of illegal drugs, or using such drugs on company premises. Both the old handbook and the revisions also stated that ''with reasonable cause,'' the Company could require an employee to submit to drug screening. The old handbook and the revisions, however, differed significantly with respect to the consequences of alleged violations of company policy. The old handbook provided that any employee violating the Company's drug policies ''will be subject to discipline up to and including immediate termination of employment.'' The revisions provided that such employee ''will be subject to immediate termination of employment.'' The old manual provided that: ''Any employee testing positive for drugs or alcohol will be suspended a minimum of thirty (30) days. Additional disciplinary action up to and including termination may be invoked based on an investigation of the incident.'' The revisions provided for an ''amnesty/rehabilitation'' program, if prior to alcohol or drug testing, the employee voluntarily discloses an alcohol or drug abuse problem. The revisions further provided that: ''Any employee who has not exercised their right to request amnesty as per this section and who subsequently refuses to be tested or tests positive for drugs or alcohol shall not be able to request amnesty, but shall be terminated.''

In late 1990, the Company distributed a policy statement applicable to its drivers. The statement indicated, under speeding disciplinary actions, a 3-day suspension for recorded violations of 65 m.p.h. or more, and a 1-week suspension for the second such violation within a 1-year period. The statement did not indicate what discipline applied to a third such violation. The new handbook provided a 1-week suspension for the first recorded speeding violation of 65 m.p.h. or more, and termination for the second such violation within a 1-year period. General Manager Johnson testified that there was no change in policy, but simply correction of a ''typo'' or ''tabbing'' error. Neither the employees nor the Union, however, were ever informed of such alleged error. I find that the new handbook reflected a change in drivers' terms and conditions of employment, by severely increasing discipline for speeding violations of 65 m.p.h. or more.

A weight belt is a support, fastened around the waist, and used by warehouse employees to prevent back injuries. Employees LaDuke and Sandifer testified in sum without contradiction as follows: The Company made available weight belts for its warehouse employees, but did not require their

use. Some employees did not use them, and LaDuke used his own. About 2 months after the election, however, Larkins and Blanchard announced that employees were now required to wear weight belts, which would be provided by the Company. I find that the announcement constituted a change in employees' working conditions.

Both the old and new handbooks stated that uniforms would be ''paid for and issued by the company.'' Michael Kontur testified in sum without contradiction as follows: About March 1 the Company issued new work uniforms. As a condition of obtaining the uniforms, the Company required each employee to sign an agreement acknowledging receipt of the uniforms, assuming responsibility for keeping and maintaining the uniforms, and agreeing to pay the uniform supplier (through payroll deduction) for lost, stolen, or damaged uniforms. The employees were not previously asked to sign such documents. I find that the Company thereby instituted a new policy that changed employees' conditions of employment.[4] It is undisputed that the Company unilaterally instituted the foregoing policy changes, including issuance of the handbook revisions and new handbook, without notice to the Union and without affording the Union an opportunity to bargain about such changes. General Manager Johnson testified without contradiction that by letter dated December 23, he informed Union Business Agent Bernie Ross that the Company anticipated reevaluating its insurance plans and possibly increasing employee premiums, and afforded Ross an opportunity to discuss the matter. The Union did not respond to the letter, although Johnson saw Ross at the hearing on objections (January 28 and 29). Johnson did not claim, in his testimony, that this was the reason why he did not inform the Union of the above-described changes. In his investigatory affidavit, Johnson stated that he didn't notify the Union about the handbook revisions ''because they were pretty inconsequential and/or because they didn't seem to me to require the union to be notified.'' Therefore it is evident that Ross' failure to respond to Johnson's letter had nothing to do with the Company's failure to notify the Union of subsequent changes. Even if it did, that would not constitute a clear and unmistakable waiver of the Union's right to receive notice and an opportunity to bargain concerning other changes in terms and conditions of employment.

''It is well settled that when a union has received a majority of the votes cast in an election an employer acts at his peril in unilaterally changing the terms and working conditions of its employees before certification of the Union.'' *East Michigan Care Corp.*, 246 NLRB 458 fn. 4 (1979), enfd. 655 F.2d 721 (6th Cir. 1981). By unilaterally making the above-described changes in unit employees' terms and conditions of employment without giving the Union notice or an opportunity to bargain concerning such changes, the Company violated and is violating Section 8(a)(5) and (1) of the Act. Except, however, with respect to the Company's actions toward Kontur in connection with the uniform policy, I am not persuaded that the Company thereby violated Section 8(a)(3), or as alleged in the complaint, ''was motivated by its desire to punish its employees because of their support for the charging union.'' In this regard I find significant: (1) lack of evidence showing such motivation, except with respect to the Kontur incident; (2) Johnson's attempt to communicate with the Union concerning proposed changes in insurance plans; and (3) the fact that the Company and Union have been negotiating since certification.

The complaint alleges that since on or about December 22, 1991, the Company ''has unilaterally promulgated, maintained and enforced a new and previously unannounced policy which requires mandatory drug/alcohol screens for all employees who suffer on-the-job injuries.'' The facts concerning this allegation are disputed. Both the old and revised handbooks provided that ''with reasonable cause,'' the Company may require an employee to submit to a urinalysis or other screening in connection with a physical examination when ''incidents or accidents resulting in damage to property, injury, or lost time occur under conditions that justify such testing in the opinion of the Company.'' It is undisputed, and General Manager Johnson so testified, that prior to September 1991, the Company did not have a practice of drug screening Monroe facility employees in connection with treatment for on-the-job injuries. In their investigatory affidavits, both given on May 20, General Manager Johnson and Warehouse Manager Larkins stated in sum as follows: At a meeting at corporate headquarters in Columbus on November 12, 1991, company officials asked Johnson if they were doing postaccident drug testing at Monroe. Johnson answered that they were not. The officials did not direct Johnson to institute such a policy. Johnson, however, acting on his own initiative, decided to institute a policy of postaccident drug screening. He so informed Larkins. There were no corporate instructions or other paper work in connection with this decision. The first employee tested pursuant to this policy was warehouseman David Krueger, in connection with an injury that he sustained on December 22, 1991. In a statement to the Michigan Employment Security Commission in connection with Kontur's claim for unemployment compensation, Larkins stated that the new policy was instituted in November 1991. In their testimony at the present hearing, Johnson and Larkins told a completely different story. They testified in sum as follows: By memorandum dated September 3, 1991, to Johnson and other managers, Company Vice President of Distribution Services Bill Bolzenius stated that the Company had a policy of post-industrial accident drug screening. The purpose of the memorandum was to circulate a release form that would allow the employee to return to work subject to the result of the test. On receiving the memorandum, Johnson instituted a policy of postaccident drug screening. The first employee so tested was Krueger, in connection with an injury on September 27, 1991. The Company's records indicate that during the period from September 3, 1991, through March 18, 1992, only Krueger sustained a reported on-the-job injury (on September 27 and December 22). The Company's records indicate that Krueger was given a drug test in connection with the September 27 injury, which proved negative. Krueger was not presented as a witness. The parties stipulated that since December 22, 1991, all employees injured on the job received drug tests. Johnson and Larkins each testified that at the time they gave their respective affidavits, they believed their statements to be true. According to Johnson, he found the September 3 memo in his files after he gave his affidavit. Johnson, however, admit-

[4] The complaint alleges that the Company unilaterally imposed a new requirement that employees reimburse the Company for lost or damaged employee handbooks at the time of separation from employment. No evidence was adduced in support of this allegation.

ted that on November 12 he told Company Vice President Deasay that they did not do postaccident drug testing at Monroe. Larkins admitted in his testimony that he had the September 3 memo at the time he gave his affidavit.

I credit the Company's uncontroverted evidence that employee Krueger was given a postaccident drug screening test in connection with his injury on September 27. In light of that fact, and the conflicting assertions given by Johnson and Larkins, I am not persuaded that at any proven time, the Company commenced a new and different policy of mandatory drug screening following on-the-job injuries. As indicated in the employee handbook, the Company always reserved the right to require such screening if warranted in its opinion. In the absence of any credible contrary explanation, the inference is warranted, and I so find, that the Company exercised that discretion in connection with Krueger's injury in September, and thereafter continued to exercise that discretion in a routine manner. I find that the Company did not at any identified time, promulgate a new policy in this regard which would require the Company to give the Union notice and an opportunity to bargain. Therefore I am recommending that this allegation of the complaint be dismissed.

C. *The Discharge of Kontur*

Michael Kontur testified that in early March, in the warehouse, Supervisor Blanchard remarked to him that he (Kontur) would be the first one gone. Greg LaDuke testified that he overheard the remark. Blanchard did not deny their testimony. Blanchard testified that he said something to Kontur like ''you would outsmart yourself and you're going to leave anyway or you'll be gone anyway,'' and that the remark (and previous conversation) had ''something to do with the Union.'' I credit Kontur and LaDuke. I find that Blanchard's remark could reasonably be interpreted by Kontur as a threat that he would be discharged because of his outspoken support for the Union. I find that the Company, by Blanchard, violated Section 8(a)(1) by impliedly threatening Kontur with discharge in retaliation for his union activity. The threat may properly be considered as evidence of the Company's motivation in subsequently terminating Kontur.

It was common knowledge at the Monroe facility that Kontur used marijuana away from work. Both Blanchard and Larkins testified that they were aware of that fact. On Monday, March 30, while at work, Kontur injured his shoulder while pushing down on a dock plate. He reported the injury to Supervisor Blanchard. The next morning Kontur obtained a slip from Larkins authorizing treatment at the clinic used by the Company. The slip also requested a drug screen (urinalysis), which was given. Kontur remained off work because of the injury until April 10. On his return, Larkins told him he was terminated, because the test results, received by the Company on April 6, were positive for marijuana (THC level of 20 nanograms). It is undisputed that the test results were positive for marijuana. The test results in Kontur's personnel file indicate ''THC (30) positive.'' Larkins testified that he did not consult with anyone before deciding to discharge Kontur, that he discharged Kontur in accordance with company policy as set forth in the revised handbook, because Kontur tested positive. Larkins further testified that he concluded solely on the basis of the test result that Kontur was under the influence of drugs, that he did not ask Kontur if there were any extenuating circumstances, and that Kontur gave none. In a memorandum to the personnel file dated April 6, Larkins stated that in accordance with company policy and the fact that Kontur did not request amnesty as outlined by that policy, ''we have no choice but to terminate'' Kontur.

I find that the Company violated Section 8(a)(1), (3), and (5) by discharging Kontur. With regard to the 8(a)(5) violation, Larkins testified in sum that he acted pursuant to company policy as set forth in the revised handbook, and therefore, although reluctant to lose a good employee, he had no discretion in the matter, and was required to terminate Kontur. As found, the Company instituted that policy in violation of its bargaining obligations to the Union. Under the former policy, the Company would not be required to terminate Kontur. As discussed, the former policy provided, in the event of a positive test result, for temporary suspension, a followup investigation of the matter, and if deemed warranted, additional discipline up to and including termination. The former policy also provided that a suspended employee could return to work if retested with negative results. In sum, the former policy did not require termination, but at most a 30-day suspension. As the Company terminated Kontur pursuant to a policy it unilaterally instituted in violation of Section 8(a)(5), it follows that the Company also violated Section 8(a)(5) and (1) by terminating Kontur, and he is entitled to the usual remedies of reinstatement with backpay. *Kysor Industrial Corp.*, 307 NLRB 598, 603 (1992).

I further find that the Company violated Section 8(a)(3) and (1) by discharging Kontur in reprisal for his strong and outspoken support for the Union. Therefore the discharge would be unlawful even if the Company had lawfully promulgated the policies set forth in its revised handbook. As found, the Company was well aware of Kontur's prounion stance, was hostile toward Kontur because of his union activity, discriminated against him, and threatened him with discharge because of that activity. On the basis of that evidence, General Counsel presented a prima facie case that the Company discharged Kontur because of his union activity. I am not persuaded that the Company met its burden of establishing that it would have discharged Kontur in the absence of his protected activity, even if it had lawfully implemented the policies in its revised handbook. The evidence fails to indicate that any employee other than Kontur was summarily discharged solely on the basis of a drug screen positive result.[5] As discussed in connection with the uniform code, the Company did not consistently enforce rules and regulations contained in the employee handbook. Moreover, as found, the Company failed to show, by credible evidence, that at any time prior to Kontur's discharge it had established a policy of mandatory postaccident drug screening. Rather the Company exercised discretion in this regard. It is also significant that the Company knew Kontur used marijuana, and that Kontur was required to take a drug test only 5 days after

[5] I do not agree with General Counsel's argument that the situation of Kevin Kaiser demonstrates disparate treatment. Kaiser, a truck driver, was given a random drug test pursuant to and in accordance with Department of Transportation regulations. Under those regulations, Kaiser could not be summarily discharged in the same manner as Kontur. The Company's correspondence in connection with Kaiser, however, is significant in that it indicates the Company understood that a positive test result does not, per se, equate with being under the influence of drugs.

receiving the handbook revisions. As indicated, the Company regarded Kontur as a good employee. Given these factors, it is probable that if the Company was not discriminatorily motivated, and believed that a positive drug test result meant mandatory discharge, the supervisors would have suggested, on issuance of the revisions, that Kontur might be interested in invoking the amnesty/rehabilitation program. Instead the Company told Kontur that he would be the first one gone. In sum, I find that the Company would not have discharged Kontur in the absence of his union activity.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time drivers, drivers' helpers, and warehouse employees employed by the Company at its facility located at 660 Detroit Street, Monroe, Michigan; but excluding office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since December 20, 1991, the Union has been and is the exclusive collective-bargaining representative of the Company's employees in the unit described above.

5. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. By discriminatorily discharging Michael Kontur, thereby discouraging membership in the Union, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) of the Act.

7. By unilaterally promulgating and implementing changes in terms and conditions of employment without affording the Union notice and an opportunity to bargain concerning such changes, and by discharging Michael Kontur pursuant to such changes, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Company has committed violations of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it be required to cease and desist therefrom, to post appropriate notices, and to take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that the Company be ordered to rescind its rules prohibiting distribution of printed material on company premises and prohibiting employees from wearing hats, clothing, or accessories displaying printing, advertisements, slogans, or logos other than the company logo. I shall further recommend that the Company be ordered, if requested by the Union, to rescind its policies and practices promulgated or instituted since December 20, 1991, concerning alcohol and drug usage, sexual harassment, penalty for driving over 65 m.p.h., mandatory wearing of weight belts, and payment for lost and damaged work uniforms, and to reimburse its employees for their losses, if any, caused by enforcement of such policies and practices, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[6] I shall recommend that the Company be ordered to offer Michael Kontur immediate and full reinstatement to his former job, or if it no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings and benefits that he may have suffered from the time of his termination to the date of the Company's offer of reinstatement. I shall further recommend that the Company be ordered to expunge from its records any reference to the unlawful termination of Kontur, to inform Kontur in writing of such expunction, and to inform him that its unlawful conduct will not be used as a basis for further personnel actions against him. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*. The Company shall be required to preserve and make available to the Board, or its agents, on request, payroll and other records to facilitate the computation of backpay and reimbursement due.

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Sygma Network Corp., a wholly-owned subsidiary of Sysco Corporation, Columbus, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in Local No. 299, International Brotherhood of Teamsters, AFL–CIO, or any other labor organization, by discriminatorily terminating employees, or in any other manner discriminating against them with regard to their tenure of employment or any term or condition of employment.

(b) Failing or refusing to bargain collectively in good faith with the Union as the exclusive representative of all its employees in the above-described appropriate unit, by unilaterally changing terms and conditions of employment of unit employees without affording the Union prior notice and an opportunity to negotiate and bargain concerning such changes as the representative.

(c) Terminating employees pursuant to such unilateral changes.

(d) Threatening employees with plant closure, discharge, loss of jobs, refusal to bargain, or other reprisal if or because they engage in union or other protected concerted activities, select the Union as their bargaining representative, or engage in a lawful strike.

(e) Promising benefits to its employees in order to discourage support for the Union or any other labor organization.

[6] Under *New Horizons*, interest on and after January 1, 1987, shall be computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(f) Interrogating employees concerning their own or other employees' membership in, activities on behalf of, or attitude toward the Union or any other labor organization.

(g) Creating the impression that union meetings or other union activities are under surveillance by indicating to employees that the Company knows of such activities.

(h) Promulgating or maintaining rules which prohibit employees from distributing union literature during nonworktime in nonwork areas of the Company's premises, or which prohibit employees from wearing union insignia.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Michael Kontur immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(b) Expunge from its files any reference to the termination of Michael Kontur, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

(c) Rescind its rules prohibiting distribution of printed material on company premises and prohibiting employees from wearing hats, clothing, or accessories displaying printing, advertisements, slogans, or logos other than the company logo, and notify its employees of such rescission.

(d) If requested by the Union, rescind its policies and practices promulgated or instituted since December 20, 1991, concerning alcohol and drug usage, sexual harassment, penalty for driving over 65 m.p.h., mandatory wearing of weight belts, and payment for lost and damaged uniforms, and reimburse its employees for their losses, if any, caused by such policies and practices, as set forth in the remedy section of this decision.

(e) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay and reimbursement due.

(f) Post at its Monroe, Michigan office and place of business copies of the attached notice marked ''Appendix.''[8] Copies of the notice on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''